No. 15-274

IN THE

Supreme Court of the United States

WHOLE WOMAN'S HEALTH, *et al.*,

Petitioners,

v.

KIRK COLE, COMMISSIONER OF THE TEXAS DEPARTMENT OF STATE HEALTH SERVICES, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICI CURIAE* NATIONAL WOMEN'S LAW CENTER AND 47 ADDITIONAL ORGANIZATIONS COMMITTED TO EQUALITY AND ECONOMIC OPPORTUNITY FOR WOMEN IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*

The National Women's Law Center is a non-profit legal advocacy organization dedicated to the advancement and protection of women's legal rights and opportunities since its founding in 1972. The Center focuses on issues of key importance to women and their families, including economic security, employment, education, health, and reproductive rights, with special attention to the needs of low-income women. Because the ability to decide whether to bear children is of tremendous significance to women's full equality, the Center seeks to preserve women's right to safe, legal abortion, and has participated as *amicus* in this Court and the lower courts in numerous cases that affect this right.

This brief is also submitted on behalf of forty-seven additional organizations listed in the Appendix to this brief. Other *amici curiae* are organizations also committed to obtaining full legal, economic, and social equality for women and economic security for women and families.[1]

Amici write to highlight the ways in which restrictions on women's constitutionally-protected right to decide to terminate a pregnancy, like the

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[1] No party or its counsel authored this brief in whole or in part, and no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for the parties have consented to the filing of this brief.

challenged provisions of House Bill 2 ("HB2"),[2] impinge on women's dignity as full and equal members of society and thus constitute an undue burden. *Amici* describe the serious adverse consequences to women's economic security, equality, opportunity, and future well-being that can result from such restrictions.

SUMMARY OF THE ARGUMENT

Abortion restrictions like the challenged provisions of HB2 deny the equal dignity guaranteed to women under the Fourteenth Amendment by unduly burdening a woman's constitutional right to decide whether to carry a pregnancy to term. Such laws violate women's constitutionally-protected liberty to make intimate, personal decisions and impose substantial costs on women, depriving them of the ability to participate in society on equal terms.

As this Court has repeatedly affirmed, the Constitution protects "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education" because such decisions are among "'the most intimate and personal choices a person may make in a lifetime, choices central to the liberty protected by the Fourteenth Amendment.'" *Lawrence v. Texas*, 539 U.S. 558, 573–74 (2003) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)). This Court's precedents also stress the deep linkage between the

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[2] Tex. Health & Safety Code Ann. §§ 171.0031, 171.041 to .048, 171.061 to .064, 245.010 to .011 (West 2013).

Due Process and Equal Protection Clauses of the Fourteenth Amendment. *See generally Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (denying same-sex couples the right to marry burdens liberty interests and abridges precepts of equality). These cases demonstrate that the Constitution's protection of intimate and personal choices is at its height when laws restricting such decisions also create or deepen inequality along certain fault lines, harming traditionally excluded groups. By protecting these fundamental liberties, the Constitution affirms the equal dignity of members of those groups targeted by such provisions.

This brief focuses on how the synergistic interplay between Due Process and Equal Protection requires this Court to have "a full awareness and understanding of the hurt that result[s]," *Obergefell*, 135 S. Ct. at 2603, from laws that constrain women's ability to make reproductive decisions. Accordingly, this brief addresses the many negative impacts that the restrictions at issue in this case have on women's economic security and equal participation in social and economic life. These include significant, and in some cases insurmountable, costs that threaten women's financial well-being, job security, workforce participation, and educational attainment. Such costs have particularly detrimental effects on low-income women, women of color, women in low-wage jobs, and women who already have children. These impacts, which deprive women of the equal dignity promised by the Constitution, confirm that the challenged provisions of HB2 unduly burden women's reproductive decision-making.

For these reasons, *amici* respectfully request that this Court reverse the judgment of the Court of Appeals for the Fifth Circuit.

ARGUMENT

I. Women's Equal Dignity Under Law Requires that Women's Reproductive Decisions Not Be Unduly Burdened

The Court has long recognized that the Constitution limits the state's ability to regulate "certain personal choices central to individual dignity and autonomy." *Obergefell*, 135 S. Ct. at 2597. The Constitution therefore protects a woman's right to decide whether or when to carry a pregnancy to term, one of "the most intimate and personal choices a person may make in a lifetime." *Casey*, 505 U.S. at 871; *see also Lawrence*, 539 U.S. at 565 ("*Roe* [*v. Wade*, 410 U.S. 113 (1973),] recognized the right of a woman to make certain fundamental decisions affecting her destiny and confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person.").

Protection of these intimate, personal decisions derives both from Due Process and Equal Protection principles, and expresses the Constitution's concern for the equal dignity of all individuals under the law. *See Obergefell*, 135 S. Ct. at 2602–04. Indeed, the right to decide whether to carry a pregnancy to term is protected by the Constitution not only because it vindicates women's decisional autonomy but also because it is key to "the ability of women to participate

equally in the economic and social life of the Nation." *Casey*, 505 U.S. at 857 Because reproductive autonomy implicates the constitutional values of both liberty and equality, the effect on women's economic security, equality, and opportunity must be considered in determining whether abortion restrictions impose an undue burden and thus deny women's equal dignity. Accordingly, the Court should subject these restrictions to heightened review—not the perfunctory deference to the legislature applied by the Fifth Circuit.

A. The Fourteenth Amendment Protects a Woman's Right to Make Reproductive Decisions, and that Right Is Linked to Equality Interests

The intimate, personal decisions protected by the Constitution lie at the nexus between the freedom from physical intrusion into the body and the home, and the "autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct." *Lawrence*, 539 U.S. at 562. Regulation of such matters is subject to close review under the Constitution because it entails government imposition on "liberty of the person both in its spatial and in its more transcendent dimensions." *Id.* In particular, the Constitution protects "liberties [that] extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs." *Obergefell*, 135 S. Ct. at 2597 (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) and *Griswold v. Connecticut*, 381 U.S. 479, 484–86 (1965)).

Beginning in a case over seventy years ago construing the Equal Protection Clause, the Court has repeatedly recognized that reproductive decisions are foundational liberties. Invalidating a statute that selectively mandated sterilization of certain felons, the Court explained that the fact that the statute "involves one of the basic civil rights of man" mandated heightened scrutiny, "lest invidious discriminations [be] made against groups or types of individuals in violation of . equal protection." *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). The Court reaffirmed this constitutional protection two decades later in *Griswold*, which struck down a law prohibiting married couples' use of contraceptives. 381 U.S. at 484. Subsequently, in *Eisenstadt*, the Court held that the Constitution protects "the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." 405 U.S. at 453 (emphasis in original).[3]

Over forty years ago, the Court applied these precedents in *Roe* to conclude that the Constitution protects "a woman's decision whether or not to terminate her pregnancy," 410 U.S. at 153, recognizing that a woman's "right to elect an abortion did have real and substantial protection as an exercise of her liberty under the Due Process Clause." *Lawrence*,

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[3] *Accord Carey v. Population Servs. Int'l*, 431 U.S. 678, 684–85 (1977) (reproductive autonomy "is at the very heart of this cluster of constitutionally protected choices concern[ing] the most intimate of human activities").

539 U.S. at 565. Approximately twenty years after *Roe*, *Casey* reaffirmed that the Constitution demands respect for women's reproductive autonomy, which implicates "intimate and personal choices central to personal dignity and autonomy." *Casey*, 505 U.S. at 851. Specifically, "where state regulation imposes an undue burden on a woman's ability to make this decision the power of the State reach[es] into the heart of the liberty protected by the Due Process Clause." *Id.* at 874; *see also Lawrence*, 539 U.S. at 573 ("In [*Casey*], the Court reaffirmed the substantive force of the liberty protected by the Due Process Clause.").

Due Process protection for intimate decisions defining personal identity has long been intertwined with equality concerns. Government action that impinges unequally on those decisions, or that restricts such decisions in a way that promotes and reinforces inequalities, deprives the persons affected of Equal Protection. *See, e.g.*, *Obergefell*, 135 S. Ct. at 2604 ("[T]he Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry."); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (denying a fundamental freedom on the basis of "classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment" deprives "all the State's citizens of liberty without due process of law"). As the Court explained in *Obergefell*:

> The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and

> rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other.

135 S. Ct. at 2602–03.[4] That is, "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects." *Lawrence*, 539 U.S. at 575. Laws that target a traditionally excluded group by infringing upon intimate decisions central to individual identity are "an invitation to subject [individual members of that group] to discrimination both in the public and private spheres." *Id.*

B. Equality Principles Heighten the Constitutional Protection for Women's Reproductive Decisions

Women's reproductive decisions are protected by the intertwined constitutional protections of liberty and equality inherent in the Fourteenth Amendment. As such, women's equal dignity demands that women have the right to decide whether to continue a pregnancy without an undue burden on that right.

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[4] *Obergefell* made explicit the connection between Due Process and Equal Protection that was implicit in the Court's earlier fundamental rights jurisprudence. *See, e.g.*, Laurence Tribe, *Equal Dignity: Speaking Its Name*, 129 Harv. L. Rev. F. 16, 17 (2015) ("*Obergefell*'s chief jurisprudential achievement is to have tightly wound the double helix of Due Process and Equal Protection into a doctrine of equal dignity.").

In *Casey*, the Court recognized that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." 505 U.S. at 856. It concluded:

> [A woman's] suffering is too intimate and personal for the State to insist, without more, upon its own vision of [her] role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.

Id. at 852; *see also id.* at 896 ("It is an inescapable biological fact that state regulation with respect to the child a woman is carrying will have a far greater impact on the mother's liberty than on the father's."). The Due Process considerations in play where state action impinges upon "intimate and personal" decisions intertwine with the Equal Protection principles that resist state regulation of women's lives in conformity with a particular historical and cultural "vision of [a woman's] role." *Id.* at 852; *accord Obergefell*, 135 S. Ct. at 2604 (the "long history of disapproval of [same-sex] relationships" informs the finding that denial of marriage equality "works a grave and continuing harm" and "serves to disrespect and subordinate" same-sex couples).

As recognized in *Casey*, "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of

human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." 505 U.S. at 851. Applying these principles, the Court in *Casey* invalidated as an undue burden a spousal notification requirement that harkened back to "the common-law understanding of a woman's role within the family." *Id.* at 897. The Court cautioned that "[t]here was a time, not so long ago," when it had both "reaffirmed the common-law principle that 'a woman had no legal existence separate from her husband,'" and "observed that 'woman is still regarded as the center of home and family life,' with attendant 'special responsibilities' that precluded full and independent legal status under the Constitution." *Id.* at 896–97 (quoting *Bradwell v. State*, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring) and *Hoyt v. Florida*, 368 U.S. 57, 62 (1961)). This view, however, was "no longer consistent with our understanding of the family, the individual, or the Constitution." *Casey*, 505 U.S. at 897. To the contrary, the spousal notification requirement embodied a view of marriage and of married women "repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution," in that it ignored women's equal dignity. *Id.* at 898. As in *Obergefell*, in the three decades that passed between *Hoyt* and *Casey*, "new insights and societal understandings" had "reveal[ed] unjustified inequality within fundamental institutions that once passed unnoticed and unchallenged." *Obergefell*, 135 S. Ct. at 2590. The lengthy history of this inequality was no justification for its continuation; to the contrary, it necessitated careful constitutional scrutiny.

Obergefell confirms the continued vitality of this "vision of antisubordination liberty."[5] There, the Court explained that "invidious sex-based classifications in marriage" which "denied the equal dignity of men and women" were "common through the mid-20th century." *Obergefell*, 135 S. Ct. at 2603. "As women gained legal, political, and property rights, and as society began to understand that women have their own equal dignity," the Court "invoked equal protection principles to invalidate [these] laws," thus "vindicating principles of liberty and equality under the Constitution." *Id.* at 2604. Just as the Court had recognized the unconstitutionality of laws imposing dignity-denying sex-based classifications that subordinated women to their husbands, it recognized in *Obergefell* the grave dignitary harm worked by laws that excluded same-sex couples from "the right to personal choice regarding marriage." *Id.* at 2599. By imposing a "disability [which] serve[d] to disrespect and subordinate" lesbian, gay, and bisexual people, these laws violated the Constitution. *Id.*

Together, *Casey* and *Obergefell* mandate careful scrutiny of laws that impair an individual's freedom to make intimate, self-defining, personal decisions without state compulsion to conform to a particular social role. This is especially so when such laws reinforce social practices or beliefs that have historically denied or disparaged the dignity of targeted

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[5] Kenji Yoshino, *The Supreme Court, 2014 Term—Comment: A New Birth of Freedom?:* Obergefell v. Hodges, 129 Harv. L. Rev. 147, 174 (2015).

groups, such as women or lesbian, gay, and bisexual people.

C. The Undue Burden Analysis Should Take into Account the Challenged Law's Impact on Women's Economic Security, Equality, and Opportunity

The Court has long recognized both that the Constitution protects a person's "decision whether to bear or beget a child," *Casey*, 505 U.S. at 851 (quoting *Eisenstadt*, 405 U.S. at 453)—and that restricting the "fundamental freedom[s]" of historically excluded groups is "directly subversive of the principle of equality," *Loving*, 388 U.S. at 12. *Casey* recognizes that the right to decide whether to carry a pregnancy to term is crucial to women's economic security and opportunity—as well as to women's ability to participate as free and equal members of society—and that regulations that unduly burden this right deny women such opportunities. Accordingly, *Casey* vindicates not only Due Process but also Equal Protection principles, which proscribe any presumption in law that "the female [is] destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas." *Stanton v. Stanton*, 421 U.S. 7, 14–15 (1975). Thus, laws that impinge on women's dignity by unduly burdening women's right to make intimate, personal decisions reinforce and perpetuate the persistent social and economic inequalities confronted by women.

Applying Due Process and Equal Protection principles, the Court has repeatedly invalidated laws

that impose such social and economic disabilities on historically excluded groups because they deny their subjects "the dignity associated with recognition as a whole human being." *Trammel v. United States*, 445 U.S. 40, 52 (1980); *see also Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984) (Sex discrimination "both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life."). The Defense of Marriage Act, for instance, not only deprived legally-married same-sex couples of tax benefits, but also told those couples that their otherwise-valid marriages were unworthy of federal recognition. This "demean[ed] the couple, whose moral and sexual choices the Constitution protects, and whose relationship the State has sought to dignify." *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013). So, too, did Louisiana's Head and Master Law, which gave men sole control of marital property, *see Kirchberg v. Feenstra*, 450 U.S. 455 (1981), and not only harmed Mrs. Feenstra financially, but also deprived her of "full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on [her] individual talents and capacities." *United States v. Virginia*, 518 U.S. 515, 532 (1996) (citing *Feenstra*, 450 U.S. at 462–63). *Obergefell* similarly recognized that laws denying same-sex couples "the constellation of benefits that States have linked to marriage" caused both economic injury and "harm [that] results in more than just material burdens." *Obergefell*, 135 S. Ct. at 2590, 2601.

In the same way, laws that restrict women's reproductive decision-making must be examined to determine the economic and dignitary costs they im-

pose on women. When laws infringe upon a woman's freedom to make personal, intimate decisions—decisions that relate to undertaking the substantial material and physical costs of pregnancy, childbirth, and motherhood, with significant consequences for women's opportunity and liberty—these costs should be given great weight in determining whether the burden they impose is undue.

In the decision on review, the Fifth Circuit undervalued both the weight of the constitutional right at issue and the serious adverse consequences that the challenged provisions of HB2 impose on women, which are discussed below. In upholding the law, the Fifth Circuit denied women's equal dignity and deprived women of their constitutionally-protected right to decide whether to terminate a pregnancy. *See, e.g.*, *Obergefell*, 135 S. Ct. at 2602 ("'[F]undamental rights may not be submitted to a vote; they depend on the outcome of no elections.'") (quoting *W. Va. Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943)).

II. The Challenged Provisions of HB2 Abridge Women's Equal Dignity by Endangering their Economic Security, Equality, and Opportunity

The challenged provisions of HB2 impose an undue burden on Texas women's reproductive decision-making. The medically unnecessary requirements for abortion providers[6] have drastic implications for

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[6] *See* Brief for Pet'rs, Arg. § I.A.1.

women's economic security, equality, and opportunity. The purpose and effect of these provisions has been to force clinics to close throughout the state.[7] As a result, Texas women are left with dramatically increased travel times and distances, as well as delays in obtaining care at the few remaining clinics. Women who ultimately reach a clinic must assume significant costs, including the costs of travel, hotel stays, childcare, and more expensive procedures. Many women may be entirely prevented from obtaining an abortion. As a result of the costs and barriers imposed by HB2, many women will face long-term consequences with respect to their financial well-being, job security, workforce participation, and educational attainment. These impacts deny women's equal dignity.

The costs women suffer are a critical part of the undue burden analysis. Laws that impose heavy costs on the exercise of fundamental rights cause injuries both dignitary and economic—"harm [that] results in more than just material burdens"—that must be weighed in the constitutional balance. *Obergefell*, 135 S. Ct. at 2601. When these impacts are considered, it is clear that the effects of the challenged provisions of HB2 on both women's liberty and equality interests constitute an undue burden. Accordingly, the challenged provisions of HB2 impinge upon women's equal dignity, limiting the ability of a woman to shape her destiny in accordance with "her own conception of her spiritual impera-

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[7] *See id.* § I.A.2.

tives and her place in society," rather than by "compulsion of the State." *Casey*, 505 U.S. at 851–52.

A. The Challenged Provisions of HB2 Impose Substantial Costs on Texas Women Seeking Abortion

The challenged provisions of HB2 require that a physician performing an abortion hold admitting privileges at a hospital located no more than thirty miles from where the abortion is performed and impose on abortion facilities the standards required for ambulatory surgical centers.[8] While the Fifth Circuit largely upheld HB2, other courts have correctly applied *Casey* to conclude that similar laws constitute "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion," *Casey*, 505 U.S. at 878, and have therefore held them unconstitutional. *See, e.g.*, *Planned Parenthood of Wisconsin, Inc. v. Schimel*, 806 F.3d 908 (7th Cir. 2015) (striking down admitting privileges requirement); *Planned Parenthood Se., Inc. v. Strange*, 33 F Supp. 3d 1330 (M.D. Ala. 2014) (same), *amended by* 2014 WL 5426891 (M.D. Ala. Oct. 24, 2014).

Full enforcement of HB2 would cause the vast majority of abortion clinics in Texas to close, leaving at most ten clinics in the state.[9] The entire Rio Grande Valley and all of Texas west of San Antonio—a region that is larger than most states and

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[8] Brief for Pet'rs, Statement § A.

[9] Brief for Pet'rs 23–25.

that is home to many of the poorest Texas women—would have no abortion providers.[10] These clinic closures would force women to travel much farther to access a clinic and will increase wait times in the few remaining clinics—or preclude access to abortion altogether.[11]

While long-distance travel can be difficult for all women, it is a grave burden on poor women. As one District Court observed in striking down Alabama's admitting privileges requirement as an undue burden, many poor women are dependent on public transportation and friends or relatives. *Strange*, 33 F. Supp. 3d at 1357. For example, without clinics in El Paso, a woman from Fort Stockton seeking an abortion in Texas and relying on public transportation would have to pay at least $120 to take a Greyhound bus roundtrip to San Antonio, with over eleven hours of travel time.[12] If she secures a medication abortion, she must make this round trip twice to receive both medication doses, or else stay overnight with associated costs. A third trip is required if she attends the follow-up appointment that her provider is required to schedule two weeks later.[13]

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[10] *Id.* at 52.

[11] *Id.*

[12] Greyhound, *Book a Trip*, https://www.greyound.com/en (last visited Dec. 29, 2015).

[13] Tex. Health & Safety Code Ann. § 171.063(e) (West 2013) (requiring that physicians schedule follow-up visits after administration of an abortion-inducing drug).

Being forced to travel long distances to obtain an abortion imposes costs beyond those associated with transportation, such as hotel expenses, and—because six in ten women having an abortion are already mothers and more than three in ten already have two or more children—childcare costs.[14] These costs impose a particularly heavy burden on low-income women. Research demonstrates that women who have abortions are disproportionately poor, with over forty-two percent from families with income below the federal poverty line and an additional twenty-six percent from families earning less than 200% of the federal poverty line.[15] For these women, incurring greater costs due to the challenged provisions of HB2 further entrenches economic instability.

Moreover, extended travel and multiple clinic visits require considerable advanced planning. The time-sensitive nature of abortion—which is safer when performed early in pregnancy[16] and is banned in Texas in most cases after twenty weeks gestation[17]—already places acute time pressure on women in need of the procedure. Flexibility to travel to mul-

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[14] Rachel K. Jones & Megan L. Kavanaugh, *Changes in Abortion Rates Between 2000 and 2008 and Lifetime Incidence of Abortion*, 117 Obstetrics & Gynecology 1358, 1362 (2011).

[15] *Id.*

[16] Linda A. Bartlett et al., *Risk Factors for Legal Induced Abortion-Related Mortality in the United States*, 103 Obstetrics & Gynecology 729, 731 (2004).

[17] Tex. Health & Safety Code § 171.044 (West 2013).

tiple clinic visits is a luxury unavailable to low-wage workers who frequently receive their work schedules just one week or less in advance.[18] Low-wage work schedules can also be unpredictable, changing weekly or even daily.[19] Because Texas generally does not require that employers provide paid vacation or sick leave[20] (and low-wage jobs in particular lack these benefits[21]), a woman unable to align her work schedule with an over-burdened clinic's schedule may risk losing income and even her job in order to obtain an abortion. Because mothers are either primary wage earners or co-wage earners in sixty-three percent of all families with children, and because families headed by single mothers are more likely to have low

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[18] Susan J. Lambert et al., *Precarious Work Schedules Among Early-Career Employees in the US* 6 (2014), https://ssascholars.uchicago.edu/sites/default/files/work-scheduling-study/files/lambert.fugiel.henly_.precarious_work_schedules.august2014_0.pdf.

[19] Restaurant Opportunities Ctr. United, *The Third Shift: Child Care Needs And Access For Low-Wage Working Mothers In Restaurants* 10 (July 2013), http://www.scribd.com/doc/161943672/The-Third-Shift-Child-Care-Needs-and-Access-for-Working-Mothers-in-Restaurants.

[20] Tex. Workforce Comm'n, *Vacation, Sick, and Parental Leave Policies*, http://www.twc.state.tx.us/news/efte/vacation_sick_and_parental_leave_policies.html (last visited Dec. 29, 2015).

[21] Claudia Williams et al., *44 Million U.S. Workers Lacked Paid Sick Days in 2010* 1, Inst. for Women's Pol'y Research (Jan. 2011), http://www.iwpr.org/publications/pubs/44-million-u.s.-workers-lacked-paid-sick-days-in-2010-77-percent-of-food-service-workers-lacked-access.

incomes,[22] such job losses can be catastrophic to economic security. In addition, most women who have abortions are single and thus cannot depend on a spouse's income if they lose their jobs.[23]

If a woman is able to keep her job, the increased travel and costs required to obtain the health care she needs will still place her economic security at risk. That is because many families—especially those headed by minimum-wage workers—have little ability to absorb extra costs. The U.S. Census Bureau considers a two-person family impoverished if its monthly income is $1,360 or less; a three-person family is below the poverty line with monthly income of $1,589 or less.[24] Assuming that one earns Texas's minimum wage of $7.25 per hour,[25] in order to make $1,360 a month, an employee must work 188 hours, and to make $1,589 a month requires more than 219 hours of work. This translates to approximately forty-three hours of minimum wage work per week for a single mother of one and fifty-

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[22] Sarah Jane Glynn, *Breadwinning Mothers, Then and Now*, Ctr. for Am. Progress 6, 8 (2014), http://cdn.americanprogress.org/wp-content/uploads/2014/06/Glynn-Breadwinners-report-FINAL.pdf.

[23] Rachel K. Jones et al., *Characteristics of U.S. Abortion Patients, 2008*, Guttmacher Inst. 6 (May 2010), https://www.guttmacher.org/pubs/US-Abortion-Patients.pdf.

[24] U.S. Census Bureau, *Poverty Thresholds*, https://www.census.gov/hhes/www/poverty/data/threshld/ (follow "2014" hyperlink) (last updated Sept. 16, 2015).

[25] Tex. Labor Code Ann. § 62.051 (West 2013).

one hours per week for a single mother of two, every week of the year, simply to remain near the poverty line. Each additional hour of travel time created by HB2 is another hour of lost wages, and therefore has a direct impact on income for women in low-wage jobs.

The additional costs imposed by the challenged provisions of HB2 also threaten women's health. Many women required to travel long distances must first save enough money to cover the added expenses, delaying the procedure. This delay is compounded by appointment wait times, which have at times exceeded three weeks at some clinics since enforcement of HB2's admitting privileges provision began.[26] If the stay of enforcement of HB2's ambulatory surgical center requirements is lifted, more clinics will close, likely increasing wait times even further.[27] Delays lead to more expensive, riskier, later-term abortions.[28] Although abortions are safe proce-

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[26] Tex. Pol'y Evaluation Project, *Abortion Wait Times in Texas* 1–2 (Oct. 5, 2015), https://utexas.app.box.com/AbortionWaitTimeBrief.

[27] In early 2014, only twenty-two percent of all Texas abortions were performed in ambulatory surgical centers. *Id.* at 1–2. Therefore, closure of non-surgical center clinics would substantially increase the workloads, and likely wait times, of surgical center clinics.

[28] Jenna Jerman & Rachel K. Jones, *Secondary Measures of Access to Abortion Services in the United States, 2011 and 2012*, 24 Women's Health Issues e419, e421–22 (2014) (the median charge for abortions at ten weeks' gestation is close to $500 and at twenty weeks is $1,350).

dures, the risk of medical complications increases with time,[29] and many women, particularly poor women, already have abortions later than they would prefer and attribute this delay to the time needed to raise money for the procedure and related travel.[30]

The costs imposed by the challenged restrictions of HB2—and the potentially devastating impact they have on Texas women's economic security—impinge upon women's equal dignity.

B. The Burdens Imposed by HB2 Are Compounded by Women's Greater Poverty and Overrepresentation in Low-Wage Jobs

The costs imposed by the challenged provisions of HB2 are particularly burdensome given existing inequalities and the economic instability many women already face.

Although women make up approximately half of the workforce, they hold two-thirds of low-wage jobs.[31] Nearly half of these low-wage jobs are held by

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[29] Bartlett et al., *supra* note 16, at 731.

[30] Lawrence B. Finer et al., *Timing of Steps and Reasons for Delays in Obtaining Abortions in the United States*, 74 Contraception 334, 335, 341 (2006).

[31] Anne Morrison & Katherine Gallagher Robbins, *Women's Overrepresentation in Low-Wage Jobs*, Nat'l Women's Law Ctr. 1 (Oct. 2015), http://www.nwlc.org/sites/default/files/pdfs/chartbook_womens_overrepresentation_in_low-wage_jobs.pdf.

women of color.[32] Within such jobs, women are typically paid less than their male counterparts.[33] Women are also more likely than men to work in part-time positions, and women of color are disproportionately likely to work in part-time positions.[34] Millions of these women work part-time not out of preference, but because they either cannot obtain full-time positions or are unable to work full time due to childcare or other family or personal obligations.[35] The problems associated with part-time work—lower hourly wages for the same work, less access to workplace benefits, denial of promotion opportunities, and unpredictable, unstable work schedules—are thus felt disproportionately by women.[36]

These realities contribute to the wealth disparities between men and women. Women are disproportionately poor compared to men and are less like-

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[32] Joan Entmacher et al., *Underpaid & Overloaded: Women in Low-Wage Jobs*, Nat'l Women's Law Ctr. 14 (2014), http://www.nwlc.org/sites/default/files/pdfs/final_nwlc_lowwagereport2014.pdf.

[33] Morrison & Gallagher Robbins, *supra* note 31, at 1.

[34] Anne Morrison & Katherine Gallagher Robbins, *Part-Time Workers Are Paid Less, Have Less Access to Benefits—and Two-Thirds Are Women*, Nat'l Women's Law Ctr. 1 (Sept. 2015), http://www.nwlc.org/sites/default/files/pdfs/part-time_workers_fact_sheet_8.21.15 13.pdf.

[35] *Id.*

[36] *Id.*

ly to escape poverty. In 2014, the national poverty rate for women was almost fifteen percent, while it was eleven percent for men. The extreme poverty rate, defined as income below fifty percent of the poverty level, was approximately seven percent for women and five percent for men.[37] And in Texas, nearly seventeen percent of women and nearly forty-two percent of female-headed households are living in poverty.[38] Women of color living in Texas are especially likely to be poor—approximately twenty-two percent of black women, twenty-four percent of Hispanic women, eleven percent of Asian women, and seventeen percent of Native American women in the state live in poverty.[39]

The clinic closures caused by the law particularly impact women of color and women in the poorest areas of Texas who are least able to overcome the substantial obstacles the law creates. In 2013, nearly seventy percent of women in Texas who obtained an abortion were women of color.[40] In the Texas coun-

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[37] Nat'l Women's Law Ctr., *National Snapshot: Poverty Among Women & Families, 2014* 1 (2015), http://www.nwlc.org/sites/default/files/pdfs/povertysnapshot2014.pdf.

[38] Nat'l Women's Law Ctr., *Poverty Rates By State, 2014* (Sept. 2015), http://nwlc.org/wp-content/uploads/2015/08/compiled_state_poverty_table_2014_final.pdf.

[39] *Id.*

[40] Tex. Dep't of State Health Servs., *Induced Terminations of Pregnancy by County of Residence and Race Ethnicity*, http://www.dshs.state.tx.us/chs/vstat/vs12/t35.shtm (last updated June 26, 2014).

ties in areas where clinics have been and will be forced to close, the residents are both particularly poor and primarily Hispanic and Latino.[41]

Families with children, and particularly families with single mothers, are especially likely to be impoverished in these areas. In Hudspeth County, Texas, for example, over seventy-five percent of families with female heads of household, no husband present, and children under eighteen, fall below the poverty line. For families with children under five years old this number is nearly ninety percent.[42] This is particularly relevant because most women who seek abortions are already mothers.[43] Nearly

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[41] *See* U.S. Census Bureau, *Texas State & County QuickFacts*, http://quickfacts.census.gov/qfd/states/48000.html (last updated Oct. 14, 2015) (follow "Hudspeth County," "Willacy County," and "Starr County" hyperlinks) (indicating a national poverty rate of 15.4%, a 44.1% poverty rate and 78.2% Hispanic or Latino population in Hudspeth County, a 40.0% poverty rate and 87.7% Hispanic or Latino population in Willacy County, and a 39.2% poverty rate and 95.8% Hispanic or Latino population in Starr County); U.S. Census Bureau, *Easy Stats* (interactive web page), http://www.census.gov/easystats/ (last visited Dec. 29, 2015) (estimating 2,020,561 men and 2,479,473 women with income below poverty level 2010–2014).

[42] U.S. Census Bureau, *Selected Economic Characteristics: 2009–2015 American Community Survey 5-Year Estimates*, http://quickfacts.census.gov/qfd/states/48/48229lk.html (follow "Economic Characteristics" hyperlink) (last visited Dec. 29, 2015).

[43] Jones et al., *supra* note 23, at 8; Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 Perspectives on Sexual & Reproductive Health 110, 115 (2005).

three-quarters of women who seek abortions do so because they are unable to support a child or lack the resources to care for existing children; many hope to have children in the future, when they are better able to provide for them.[44]

These inequalities women face are further deepened by the challenged provisions of HB2 which restrict women's decisions about whether to terminate a pregnancy, compromising women's equal dignity.

C. Women Unable to Obtain an Abortion as a Result of the Challenged Provisions of HB2 Incur Significant Economic and Dignitary Costs

The clinic closures resulting from the challenged provisions of HB2 will prevent many Texas women from obtaining an abortion altogether. A woman may be unable to save enough money for the procedure itself and the accompanying travel, childcare, or hotel expenses, or unable to take the necessary time off work. *See Planned Parenthood of Wis., Inc. v. Van Hollen*, 94 F. Supp. 3d 949, 991 (W.D. Wis. 2015) ("At some point, the additional costs associated with travel—including gas, tolls, hotel room stays, bus tickets, lost wages and childcare—may reach a tipping point where they become too great for a household to bear and the woman would not be able to get the abortion.") (quotation and brackets omitted), *aff'd sub nom. Schimel*, 806 F.3d 908. And if

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[44] Finer et al., *supra* note 43, at 114–15.

too much time elapses before a woman is able to save enough money, she may be precluded from obtaining an abortion if she goes past Texas's twenty-week limit, which has only very limited exceptions.[45] For these women, HB2 imposes not just substantial, but in fact insurmountable, obstacles, obstacles that violate women's equal dignity.

1. Women Unable to Obtain Abortions Face Substantial Short Term Costs

Preventing women from exercising their right to reproductive decision-making has immediate negative economic consequences that impact women's lives in a variety of ways, impinging on their equal dignity.

Some women need abortions for health reasons. Foreclosing access to abortion will threaten both their health and their and their families' economic security. Pregnancy is contraindicated for some women, and some pregnant women develop conditions—such as severe infection, heart failure, or severe preeclampsia—for which pregnancy termination is medically indicated.[46] If a woman is unable to

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[45] Tex. Health & Safety Code Ann. § 171.044 (West 2013).

[46] *See* Kim Painter, *Doctors Say Abortions Do Sometimes Save Women's Lives*, USA Today (Oct. 22, 2012), http://www.usatoday.com/story/news/nation/2012/10/19/abortion-mother-life-walsh/1644839/; *see also Principles of Medical Therapy* 8–9 (Norbert Gleicher, ed., 1985); Lara A. Friel, *Heart Disorders During Pregnancy*, Merck Manual, http://www.merckmanuals.com/home/women's-health-issues/

terminate the pregnancy, the potentially serious health consequences can have a devastating impact on all aspects of her life. Health is critically important to maintaining employment.[47] A woman's inability to work, or a serious reduction in her wages, can be catastrophic to her and her family's economic security, particularly given that the households most affected by restrictions such as the challenged provisions of HB2 are close to or already living in poverty. In addition to lost jobs and wages, women in poor health may be unable to care for their children and families, which is especially devastating to families because women still shoulder the majority of caregiving responsibilities.[48]

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pregnancy-complicated-by-disease/heart-disorders-during-pregnancy (last visited Dec. 29, 2015).

[47] Cathy Schoen et al., *The Link Between Health and Economic Security for Working-Age Women*, The Commonwealth Fund (May 1999), http://www.cmwf.org/usr_doc/healtheconomic_brief.pdf. Non-elderly adults in poor health are "less than half as likely to work [compared to someone in excellent health], and if they did work, their hourly wage was about 23% lower." Jack Hadley, *Sicker and Poorer—The Consequences of Being Uninsured*, 60 Medical Care Res. & Rev. Supp. at 85 (2003).

[48] Pew Research Ctr., *Raising Kids and Running a Household: How Working Parents Share the Load* 2 (2015), http://www.pewsocialtrends.org/files/2015/11/2015-11-04_working-parents_FINAL.pdf; Kenneth Matos & Ellen Galinsky, *Workplace Flexibility in the United States*, Families & Work Inst. 1 (2011), http://familiesandwork.org/downloads/WorkplaceFlexibilityinUS.pdf.

Women forced to carry their pregnancies to term also face numerous other costs. Pregnant workers often face discrimination in the workplace, which puts their health and economic security at risk and threatens their career advancement. For example, pregnant workers, particularly in physically-demanding and low-wage jobs, with a medical need for temporary accommodations, such as avoiding heavy lifting, too often have requests for accommodation denied.[49] Pregnant women are also denied promotions because of employers' preconceptions about pregnant women's career plans.[50]

Moreover, pregnancy and childbirth impose substantial and direct healthcare costs. The average charge in a Texas hospital for vaginal delivery of a baby with no complications is nearly $10,000; with complications, this rises to over $13,000.[51] The cost

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[49] Nat'l Women's Law Ctr., *Accommodating Pregnancy on the Job* 1 (May 2014), http://nwlc.org/sites/default/files/pdfs/the_stakes_for_woc_final.pdf; *see, e.g.*, *Young v. United Parcel Service, Inc.*, 135 S. Ct. 1338, 1367 (2015) ("There must be little doubt that women who are in the work force—by choice, by financial necessity, or both—confront a serious disadvantage after becoming pregnant.") (Kennedy, J., dissenting).

[50] As one employer told researchers, "[f]or one opening, we had an employee who was highly qualified. However, we didn't ask her if she would be interested in the position, since she was pregnant and we assumed that she wouldn't want to move." Joanna Barsh & Lareina Yee, *Unlocking the Full Potential of Women at Work*, McKinsey & Co. 7 (2012).

[51] *See* Childbirth Connection, *Average Facility Labor and Birth Charge by Site and Method of Birth, Texas, 2008–2010* (2012), http://transform.childbirthconnection.org/wp-content/uploads/2012/05/Texas.pdf.

of caesarian delivery ranges from approximately $16,000 to over $21,000.[52] These expenses are compounded if the child requires additional care such as admission to a neonatal intensive care unit.[53] The risk of medical complications (and associated high medical costs) increases when childbirth follows an unintended pregnancy.[54] Among other things, such births are associated with low birth weight and increased rates of infant mortality.[55]

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[52] *Id.*

[53] *See* Guttmacher Inst., *Unintended Pregnancy in the United States* 1 (July 2015), https://www.guttmacher.org/pubs/FB-Unintended-Pregnancy-US.pdf.

[54] Rebecca B. Russell et al., *Cost of Hospitalization for Preterm and Low Birth Weight Infants in the United States*, Pediatrics, July 2007, at e3 (preterm and low birthweight hospital stays averaged a cost of $15,100).

[55] *The Best Intentions: Unintended Pregnancy and the Well-Being of Children and Families* 71–72 (Sarah S. Brown & Leon Eisenberg, eds., 1995). Childbirth also presents one of the most serious health risks many women experience in their lifetimes, and rates of severe pregnancy complications are rising in the United States. Ctrs. for Disease Control & Prevention, *Severe Maternal Morbidity in the United States*, http://www.cdc.gov/reproductivehealth/maternalinfanthealth/severematernalmorbidity.html (last updated Sept. 22, 2015). The rate of pregnancy-related deaths in Texas has recently increased for all women, and particularly for Black women. The maternal mortality rate for Black women in Texas almost quadrupled in just four years, and in 2011 was more than twice the rate for Texas women of all races. Tex. Dep't of State Health Servs., *Maternal Mortality and Morbidity Task Force Report* 6 (Sept. 2014), https://www.dshs.state.tx.us/legislative/2014/Attachment1-MMMTF-LegReport-FCHS-1-081214.pdf.

While the Affordable Care Act requires certain insurance plans to cover pregnancy and prenatal care, a significant number of women in Texas would be responsible for all or part of these costs. In 2014, at least 260,000 uninsured Texas women of reproductive age lived in households with income that exceeded Medicaid or Children's Health Insurance Program eligibility thresholds for pregnant women,[56] and, therefore, could not enroll in either coverage program if they became pregnant. Even women who are insured may face significant out-of-pocket costs. For example, many of the most popular plans in the Texas marketplace carry a family out-of-pocket maximum of $13,000 or more, and thus can impose $13,000 in annual deductibles and cost-

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The health risks of childbirth in general are significantly higher than those associated with abortion; in Texas, compelling a woman seeking an abortion to carry her pregnancy to term effectively increases her mortality risk one hundredfold. *See* Brief for Pet'rs 16 (citing J.A. 538).

[56] This calculation is based on the U.S. Census Bureau's Current Population Survey. *See* U.S. Census Bureau, *Current Population Survey* (2015), https://www.census.gov/hhes/www/poverty/publications/pubs-cps.html. This figure includes uninsured women of reproductive age (18–49) in Texas with income 300% of the federal poverty level and above, which should incorporate women who are above Medicaid and CHIP income eligibility levels once adjusting for the increased household size used to calculate eligibility for pregnant women. This is a rough approximation of uninsured women of reproductive age in Texas who are not eligible to have costs of pregnancy covered by Medicaid or CHIP.

sharing for pregnancy, childbirth, and newborn care, in addition to plan premiums.[57]

Texas women forced to carry their pregnancies to term may also face job insecurity because Texas law does not require employers to provide any unpaid leave beyond what is legally mandated by the Family and Medical Leave Act ("FMLA") and does not require any paid parental leave.[58] For many Texas women, having a child means choosing between caring for their newborn and a paycheck, or worse—for women whose jobs do not qualify for FMLA—their jobs. Less than half of working mothers in Texas are eligible for job-protected unpaid leave after child-

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[57] This calculation is based on the 2016 QHP Landscape Individual Market Medical dataset provided by the U.S. Department of Health and Human Services through healthcare.gov. *See* U.S. Dep't of Health & Human Servs., Ctrs. for Medicare & Medicaid Servs., ***2016 QHP Landscape Individual Market Medical*** (2015), https://data.healthcare.gov/dataset/2016-QHP-Landscape-Individual-Market-Medical/v7sn-c66v. This figure includes the out-of-pocket maximums of all QHPs, plans offered on the Texas Health Insurance Marketplace, in the five largest counties in Texas including Harris, Dallas, Tarrant, Bexar and Travis.

[58] *See* Tex. Workforce Comm'n, *supra* note 20.

birth,[59] and only an estimated one-third can actually afford to take this leave.[60]

The high stakes choices Texas women may face after being forced to carry a pregnancy to term highlight the harms to equality and dignity caused by laws curtailing women's ability to decide whether to carry their pregnancies to term.

2. Women Unable to Obtain Abortions Also Face Substantial Long Term Costs

Many women unable to obtain an abortion will face long-term negative consequences with respect to their economic security, workforce participation, and educational opportunities. The significance of these consequences underscores the importance to a woman's equal dignity of being able to decide whether or when these substantial costs should be incurred.

A study comparing women who terminated a pregnancy to those who wanted but were unable to obtain an abortion found that women denied an

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[59] Inst. for Child, Youth, & Family Pol'y, *Working Mothers Who Are Eligible for FMLA Unpaid Leave*, http://www.diversitydatakids.org/data/map/513/working-mothers-who-are-eligible-for-fmla-unpaid-leave-share/#loct=2&tf=17 (last visited Dec. 29, 2015).

[60] Inst. for Child, Youth, & Family Pol'y, *Working Mothers Who Are Eligible for and Can Afford FMLA Unpaid Leave*, http://www.diversitydatakids.org/data/map/515/working-mothers-who-are-eligible-for-and-can-afford-fmla-unpaid-leave-share/#loct=2&tf=17 (last visited Dec. 29, 2015).

abortion were worse off financially one year later.[61] Seventy-six percent of women denied an abortion were receiving public assistance compared to forty-four percent of women who received an abortion.[62] In addition, women who were unable to obtain an abortion were less likely to be employed in a full-time job and more likely to be living below the federal poverty line.[63]

If a woman is able to return to work after having a child, she will need access to childcare. For many women, finding childcare to match their schedules can be a significant challenge, especially women in low-wage jobs with nonstandard, irregular, or unpredictable hours. Childcare-related absences are partially responsible for the overrepresentation of women in the part-time labor market.[64] At the same time, childcare arrangements can be particularly challenging for women working part-time jobs, which are likely to have hours that vary weekly and tend to

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[61] Diana Greene Foster, Presentation at the American Public Health Association Annual Meeting & Expo: Socioeconomic Consequences of Abortion Compared to Unwanted Birth (Oct. 30, 2012), https://apha.confex.com/apha/140am/webprogram/Paper263858.html.

[62] *Id.*

[63] *Id.* Forty-eight percent of women denied an abortion were employed in a full-time job compared to fifty-eight percent of women who received an abortion; sixty-seven percent of women denied an abortion were below the federal poverty line in comparison to fifty-six percent of women who received an abortion.

[64] Morrison & Gallagher Robbins, *supra* note 34, at 1.

be scheduled one week or less in advance, increasing the likelihood that women will miss work for childcare-related reasons.[65]

Affordable, high-quality care that enables women to work and that ensures the well-being of children can be extremely difficult to find, particularly for low-income women. In Texas, the average annual cost of full-time center care for an infant is over $8,700.[66] There were 17,730 children on the waiting list for childcare assistance in Texas as of February 2015.[67] And, of course, childcare is only one of many child-rearing expenditures. The average total annual cost of supporting one child in a single-parent household ranges from $10,440 to $12,330 depending on the child's age; the costs of raising two children range from $17,360 to $18,830; and for three children the range is $20,720 to $22,070.[68] The total

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[65] *Id.* at 3.

[66] Lynette Fraga et al., *Parents and the High Cost of Child Care*, Child Care Aware 53 (2015), http://usa.childcareaware.org/wp-content/uploads/2015/12/Parents-and-the-High-Cost-of-Child-Care-2015-FINAL.pdf.

[67] Karen Schulman & Helen Blank, *Building Blocks: State Child Care Assistance Policies 2015*, Nat'l Women's Law Ctr. 26 (2015), http://nwlc.org/resources/building-blocks-state-child-care-assistance-policies-2015/.

[68] Mark Lino, *Expenditures on Children by Families, 2013*, U.S. Dep't of Agric. 16 (2014), http://www.cnpp.usda.gov/sites/default/files/expenditures_on_children_by_families/crc2013.pdf.

costs of raising a child account for twenty-five percent of low-income families' gross income.[69]

Beyond the immediate costs associated with having a child, women also face diminished earnings, interference with their career advancement, disruption of their education, and fewer resources for children they already have. This is especially true with respect to childbirth from unintended pregnancies.[70] Studies show that having a child creates both an immediate decrease in women's earnings and a long-term drop in their lifetime earning trajectory.[71] Women earn three percent more for each year of delayed childbearing.[72] Forty-one percent of working mothers report that being a parent has negatively impacted their ability to advance in their jobs.[73]

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[69] *Id.* at 10.

[70] Christine Dehlendorf et al., *Disparities in Abortion Rates: A Public Health Approach*, 103 Am. J. Pub. Health 1772, 1775 (2013) ("Unintended childbirth is associated with decreased opportunities for education and paid employment[.]"); Adam Sonfield et al., *The Social and Economic Benefits of Women's Ability to Determine Whether and When to Have Children* 14–15 (2013), https://www.guttmacher.org/pubs/social-economic-benefits.pdf.

[71] *See, e.g.*, Sonfield et al., *supra* note 70 (reviewing studies that document how controlling family timing and size contribute to educational and economic advancements).

[72] Kelleen Kaye et al., *The Benefits of Birth Control in America*, Nat'l Campaign to Prevent Teen and Unplanned Pregnancy 4 (2014), http://thenationalcampaign.org/sites/default/files/resource-primary-download/getting-the-facts-straight-final.pdf.

[73] Pew Research Ctr., *supra* note 48, at 2.

Mothers are viewed as less competent and committed, held to harsher performance and punctuality standards, and recommended for lower starting salaries than women without children.[74]

Being forced to carry an unintended pregnancy to term can also undermine women's educational opportunities. Teenagers who give birth are much less likely to obtain a high school diploma than those who are not mothers until after their teen years, and few teenage mothers attend college.[75] Only about half of teen mothers receive a high school diploma by age twenty-two, compared to eighty-nine percent of women who did not have a child during their teen years, and one-third of teen mothers never get a diploma or a GED.[76] One survey found that twenty-six percent of high school dropouts said that becoming a parent played a role in their decisions to leave school, and one third of female dropouts said becoming a parent was a major factor in leaving school.[77]

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[74] Shelley J. Correll et al., *Getting a Job: Is There a Motherhood Penalty?*, 112 Am. J. Sociology 1297, 1316–17 (2007).

[75] Kate Perper et al., *Diploma Attainment Among Teen Mothers* 1 (Jan. 2010), http://www.childtrends.org/wp-content/uploads/2010/01/child_trends-2010_01_22_FS_diploma attainment.pdf; Brown & Eisenberg, *supra* note 55, at 55–56.

[76] Perper et al., *supra* note 75, at 1.

[77] John M. Bridgelang et al., *The Silent Epidemic: Perspectives of High School Dropouts*, Civic Enterprises & Peter D. Hart Research Assocs. 6 (Mar. 2006), http://files.eric.ed.gov/fulltext/ED513444.pdf.

The ability to decide if or when to become mothers has thus contributed to significant gains for women across the socioeconomic spectrum.[78] Women who delay childbearing can more easily mitigate the earnings loss associated with motherhood by investing in education and obtaining crucial early work experience. Women able to choose later childbearing and further education achieve greater socioeconomic mobility and are likely to pass on their educational advantage to their children.[79]

Indeed, the decision whether or when to have a child is one of the most important economic decisions most American women will make. Impairing women's ability to make this decision denies women's equal dignity and has drastic implications for economic security, equality, and opportunity. Restrictions on abortion that have this effect thus constitute undue burdens on women's constitutional right to decide whether to terminate a pregnancy.

III. HB2 Violates Women's Equal Dignity and Constitutes an Undue Burden on Women's Reproductive Decision-Making

The Court has made clear that the Constitution's liberty and equality protections are "instructive as to the meaning and reach of the other," and that this

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[78] Kaye et al., *supra* note 72, at 29–31.

[79] *See* Joanna Venator & Richard V. Reeves, *Three Reasons College Matters for Social Mobility*, Brookings Institution (Feb. 6, 2015), http://www.brookings.edu/blogs/social-mobility-memos/posts/2015/02/06-college-education-equity-reeves.

"interrelation of the two principles furthers our understanding of what freedom is and must become." *Obergefell*, 135 S. Ct. at 2603.

Assessing the challenged provisions of HB2 through this lens clarifies that the law constitutes an unconstitutional undue burden on women's liberty to decide whether to carry a pregnancy to term. The increased costs imposed on women as a result of these provisions significantly impinge upon and even prevent some women from exercising their right to decide whether to carry a pregnancy to term. As a result, these costs "constitute a substantial obstacle, and in turn an undue burden." *Van Hollen*, 94 F. Supp. 3d at 994.

The linkage of Equal Protection and Due Process principles confirms that the harms wrought by the law—harms to women's financial well-being, job security, educational attainment, and future opportunity—must be considered when weighing the burden that the law imposes on women's reproductive decision-making. The challenged provisions of HB2 cause women's lives to be unjustifiably disrupted when they seek an abortion, with potentially drastic implications for their economic security and opportunity. The law perpetuates and deepens longstanding gender inequalities by disregarding the costs imposed on women, thereby impairing women's full participation in society.

For far too long, expectations about women's role as child-bearer were used as a justification for laws that harmed women's dignity and limited their equal liberty to make fundamental decisions regarding

their own lives. "These views, of course, are no longer consistent with our understanding of the family, the individual, or the Constitution." *Casey*, 505 U.S. at 897. By imposing substantial and sometimes insurmountable costs on women seeking an abortion, the challenged provisions of HB2 abridge women's equal dignity in profound ways. These impacts demonstrate that the challenged provisions of HB2 violate women's liberty to make the profoundly intimate decisions regarding whether or when to have a child, and thus constitute an unconstitutional undue burden.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that this Court reverse the decision of the Court of Appeals for the Fifth Circuit.

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APPENDIX

APPENDIX: STATEMENTS OF INTEREST OF ADDITIONAL *AMICI CURIAE*

9to5, National Association of Working Women is a forty-two-year-old national membership organization of women in low-wage jobs organizing for workplace fairness, equal opportunity, and economic security.

Founded in 2008, the **Abortion Care Network** ("ACN") is the national association for independent community-based, abortion care providers and their allies. ACN and its member clinics, including the named plaintiff in this case, work to ensure the rights of all people to experience respectful, dignified abortion care. Independent abortion providers care for the majority of people seeking abortion care in the United States, often serving individuals and families in the most rural parts of our nation and those with the least financial resources.

The **Anti-Defamation League** ("ADL"), founded in 1913, is a national Jewish civil rights and human relations organization dedicated to principles of religious and individual liberty, including the right to privacy. ADL views reproductive choice as an issue of personal and religious freedom. ADL has participated as *amicus curiae* in numerous cases before the Supreme Court and other courts when these issues have been implicated, including *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), *Stenberg v. Carhart*, 530 U.S. 914 (2000), *Ayotte v. Planned Parenthood*, 546 U.S. 320 (2006), *Gonzales v. Car-*

hart, 550 U.S. 124 (2007), and *McCullen v. Coakley*, 134 S. Ct. 2518 (2014).

The **Alliance for a Just Society** and its affiliates have long worked on health care and women's health. We are deeply concerned about the ability of women to be able to make choices about their health and their economic future.

Alliance for Justice ("AFJ") is a national association of over 100 organizations committed to progressive values and the creation of an equitable, just, and free society. AFJ works to ensure that the federal judiciary advances core constitutional values, preserves human rights and unfettered access to the courts, and adheres to the even-handed administration of justice for all Americans.

In 1881, the **American Association of University Women** ("AAUW") was founded by like-minded women who had defied society's conventions by earning college degrees. Since then it has worked to increase women's access to higher education through research, advocacy, and philanthropy. Today, AAUW has more than 170,000 members and supporters, 1,000 branches, and 800 college and university partners nationwide. AAUW plays a major role in mobilizing advocates nationwide on AAUW's priority issues to advance gender equity. In adherence with our member-adopted Public Policy Program, AAUW supports choice in the determination of one's reproductive life and increased access to health care and family planning services.

Since 1914, the **American Sexual Health Association** has been committed to ensuring that women have access to essential health care and believes that the ability to manage when they bear children is critically important to women's health and economic well-being.

Asian Americans Advancing Justice | AAJC ("Advancing Justice | AAJC") is a non-profit, nonpartisan organization that seeks to promote a fair and equitable society for all by working for civil and human rights. Over one million Asian Americans live in Texas, and the percentage of Asians as a portion of Texas's overall population increased over seventy percent between the 2000 and the 2010 census surveys. Equal protection under the law for these and other individuals is of paramount importance to Advancing Justice | AAJC.

The **Black Women's Health Imperative** ("Imperative") is the only national Black non-profit organization dedicated to promoting optimum health for Black women across the life span. The Imperative strongly believes that everyone in the United States should receive equal access to health coverage and that health disparities based on health status, gender, and race must be eliminated.

California Women Lawyers ("CWL") has represented the interests of more than 30,000 women in all facets of the legal profession since 1974. CWL's mission includes advancing women's interests, extending universal equal rights, and eliminating bias. In pursuing its values of social justice and gender equality, CWL often joins *amicus* briefs challenging

discrimination by private and governmental entities, weighs in on proposed legislation, and implements programs fostering the appointment of women and other qualified candidates to the bench.

The **California Women's Law Center** ("CWLC") is a statewide, non-profit law and policy center dedicated to advancing the civil rights of women and girls through impact litigation, advocacy, and education. CWLC's issue priorities include reproductive justice, gender discrimination, violence against women, and women's health. Since its inception in 1989, CWLC has understood that to achieve equality, women must have autonomy to make their own reproductive health decisions. CWLC has advocated for unburdened and equal access to reproductive health choices for all women.

Chicago Foundation for Women joins as *amicus* in the case of *Whole Woman's Health v. Cole*. It is consistent with our core philosophy of equal rights for women.

Connecticut Citizen Action Group ("CCAG") is a statewide membership organization dedicated to building a more just and democratic society.

The **Connecticut Women's Education and Legal Fund** ("CWEALF") is a non-profit women's rights organization dedicated to empowering women, girls, and their families to achieve equal opportunities in their personal and professional lives. CWEALF defends the rights of individuals in the courts, educational institutions, workplaces, and in their private lives. Since its founding in 1973, CWEALF has pro-

vided legal education and advocacy and conducted research and public policy work to advance women's rights. Throughout our history, we have defended women's access to reproductive services, regardless of socio-economic status.

Founded on Labor Day 2000, the mission of the **District of Columbia Employment Justice Center** ("EJC") is to secure, protect, and promote workplace justice in the D.C. metropolitan area. Since our founding, the EJC has successfully used a combination of strategies to protect the rights of low-income workers, including legal services, policy advocacy, community organizing, and education.

Founded in 1974, **Equal Rights Advocates** ("ERA") is a national non-profit legal organization dedicated to protecting and expanding economic and educational access and opportunities for women and girls. ERA seeks to preserve women's right to a safe, legal abortion and has participated in *amicus* briefs in this Court in cases that affect this right.

The **Feminist Majority Foundation** ("FMF"), founded in 1987, is the largest feminist research and action organization dedicated to women's equality and reproductive health. FMF's programs focus on advancing the legal, social, economic, and political equality of women. To carry out these aims, FMF engages in research and public policy development, public education programs, grassroots organizing, and leadership training and development programs. FMF has filed numerous *amicus curiae* briefs in the U.S. Supreme Court and the federal circuit courts to defend women's reproductive rights, including the

right to access safe, legal abortion, and to advance opportunities for women and girls.

Hadassah, the Women's Zionist Organization of America, Inc., founded in 1912, is the largest Jewish and women's membership organization in the United States, with over 330,000 members, associates, and supporters nationwide. While traditionally known for its role in developing and supporting health care and other initiatives in Israel, Hadassah has longstanding commitments to improving health care access in the United States, particularly with regard to the health care needs of women. Hadassah strongly supports full and complete access to reproductive health care services and a woman's right to make health decisions according to her own religious, moral and ethical values and recognizes the role that reproductive freedom plays in women's empowerment, economic equity, and security.

The **Institute for Science and Human Values** is committed to protecting and advancing women's full equality and health, with a particular interest in ensuring that women receive all of the benefits of access to family planning and their constitutional right to make their own reproductive decisions.

Jewish Women International ("JWI") is a Washington, D.C. not-for-profit organization founded in 1897 and incorporated in 1995 (www.jwi.org). JWI is the leading Jewish organization empowering women and girls through healthy relationship training, financial literacy education, and the proliferation of women's leadership. JWI's innovative programs, policy advocacy, and philanthropic initiatives

protect the fundamental rights of all girls and women to live in safe homes, thrive in healthy relationships, and realize the full potential of their personal strength.

Legal Momentum, the Women's Legal Defense and Education Fund, is the oldest legal women's rights advocacy group in the United States and has worked to advance the rights of women and girls since 1970. Inherent in our mission is securing and protecting reproductive rights. To this end, Legal Momentum has been involved in dozens of cases protecting the right to choose in state and federal courts throughout the country. Legal Momentum has also authored and submitted several *amicus* briefs to the U.S. Supreme Court challenging the constitutionality of policies and statutes that infringe on women's right to choose. *See, e.g.*, *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (holding that hospital drug testing of pregnant women violated the Fourth Amendment); *Stenberg v. Carhart*, 530 U.S. 914 (2000) (striking down Nebraska statute that criminalized various abortion procedures). Legal Momentum has also represented doctors, women, and clinics to defend the Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. § 248, against constitutional challenges.

Mabel Wadsworth Women's Health Center is the only not-for-profit, freestanding, independent feminist health center in Maine and one of only fourteen nationwide. For more than thirty-one years, the Center has advocated for access to abortion care. The Center's mission is to provide educational and clinical services in sexual and reproductive health

care to women regardless of age, ability, race or ethnicity, sexual orientation, or economic status.

The **Maine Women's Lobby** is an advocacy organization founded in 1978 to improve the social, political, and economic well-being of Maine women and girls. We have four areas of focus: freedom from violence, freedom from discrimination, access to health care, and economic security.

NARAL Pro-Choice America ("NARAL") is a national advocacy organization, dedicated since 1969 to supporting and protecting, as a fundamental right and value, a woman's freedom to make personal decisions regarding the full range of reproductive choices through education, organizing, and influencing public policy. NARAL works to guarantee every woman the right to make personal decisions regarding the full range of reproductive choices.

The **National Asian Pacific American Women's Forum** ("NAPAWF") is the country's only national organization building a movement for social justice and human rights for Asian American and Pacific Islander ("AAPI") women and girls in the United States. Texas is home to the third highest populations of AAPI women and many NAPAWF members.

The **National Association of Women Lawyers** ("NAWL") is the oldest women's bar association in the United States and the leading national voluntary organization devoted to the interests of women lawyers and women's rights. Founded in 1899, NAWL has a long history of serving as an educational forum and an active voice for the concerns of women. As

part of its mission, NAWL promotes the interests of women and families by participating as *amicus curiae* in cases of interest.

The **National Center for Transgender Equality** ("NCTE"), founded in 2003, is dedicated to improving the lives of transgender people and ending discrimination and violence through advocacy, education, and collaboration. NCTE works with Congress, federal agencies, state and local advocates and stakeholders to advance public policies that will improve transgender people's lives in areas including employment, health care, housing, and education.

The **National Congress of Black Women, Inc.** ("NCBW") is a 501(c)(3) non-profit organization that has been working for the benefit of women and their families since 1984. We were founded by then-Congresswoman Shirley Chisholm as a means for Black women to become more active politically to engage in policy-making and promotion of Black women for entering and working at all levels of government and to urge more to run for offices in their communities. We promote the right of women to choose and make all medical decisions about their lives. We have participated in numerous *amicus* briefs in this Court in cases that affect this right and other rights of women.

The **National Family Planning & Reproductive Health Association** ("NFPRHA") represents the broad spectrum of family planning administrators and clinicians serving the nation's low-income and uninsured populations. NFPRHA's 880 organizational members operate or fund a network of nearly

5,000 health centers and service sites in all fifty states and the District of Columbia, providing family planning and other preventive health services to millions of low-income and uninsured or underinsured individuals each year. NFPRHA believes that all people should have timely access to a comprehensive range of affordable, confidential, high-quality reproductive health services, including abortion. NFPRHA works to ensure that health professionals are able to offer a full range of services to each patient based on their individual health needs.

The **National Institute for Reproductive Health** is a non-profit advocacy organization working across the country to increase access to reproductive health care by changing public policy, galvanizing public support, and normalizing women's decisions to have abortions and use contraception. In order to support the vision of a society in which each person has the freedom to control their reproductive and sexual lives, the National Institute for Reproductive Health seeks to preserve women's right to a safe, legal abortion and has filed or participated in numerous *amicus* briefs in cases that affect this right.

The **National Organization for Women, Inc.** ("NOW") is one of the largest grassroots feminist organizations in the United States, with hundreds of thousands of contributing members in hundreds of chapters in all fifty states and the District of Columbia. NOW's purpose is to lead societal change to ensure that all women can participate in the social, political, and economic spheres of life. Since its inception, NOW's goals have included protecting women's constitutional right to decide whether or not to have

an abortion and ensuring that every woman can meaningfully exercise her fundamental reproductive rights.

The **National Women's Health Network** ("NWHN") was founded in Washington, DC, in 1975 to improve the health of all women by developing and promoting a critical analysis of women's health issues. We work to defend women's sexual and reproductive health and autonomy against anti-choice threats that seek to undermine access to contraception and abortion care. We also support access to the full range of safe and effective reproductive health technologies, services, and information, including abortion, without medically unnecessary restrictions or restrictions driven by ideology.

The **North Dakota Women's Network** ("NDWN") is a statewide women's advocacy organization working to improve women's lives through communication, legislation, and increased public activism.

People For the American Way Foundation ("PFAWF") is a non-partisan civic organization established to promote and protect civil and constitutional rights, as well as American values like equality and opportunity for all. Founded in 1981 by a group of civic, educational, and religious leaders, PFAWF now has hundreds or thousands of members nationwide. Throughout its history, PFAWF has conducted extensive educational, outreach, litigation, and other activities to promote these values, including filing *amicus* briefs with this Court concerning reproductive rights and women's equality. This brief is also joined specifically by Young People For

("YP4"), a leadership development program of PFAWF, which identifies and trains the next generation of progressive activists to create change on their college campuses and in their communities.

Raising Women's Voices for the Health Care We Need ("RWV") is a national initiative working to ensure that the health care needs of women and our families are addressed as the Affordable Care Act is implemented. It has a diverse network of thirty-one grassroots health advocacy organizations in twenty-eight states. RWV has a special mission of engaging women who are not often invited into health policy discussions: women of color, low-income women, immigrant women, young women, and members of the lesbian, gay, bisexual, transgender, and queer community. RWV believes that all people should have access to safe, legal, abortion and has participated in numerous *amicus* briefs in this Court in cases that impact access to reproductive healthcare.

The **Reproductive Health Access Project** is a national non-profit organization dedicated to training and supporting clinicians to provide reproductive health care. We are guided by the belief that individuals of all socioeconomic levels no matter where they live should have safe access to abortion, contraception, and miscarriage care.

The **Reproductive Health Technologies Project** ("RHTP") works to advance the ability of every woman to achieve full reproductive freedom with access to the safest, most effective, and preferred methods for controlling her fertility and protecting her health. RHTP's long-term goal is to change the political and

commercial climate in the United States so women have access to technologies they want to become pregnant when they are ready, end a pregnancy when they are not, and promote their health and wellbeing throughout their reproductive lives.

The **Sargent Shriver National Center on Poverty Law** ("Shriver Center") advocates on behalf of low-income families and individuals, representing them in a wide range of policy and legal matters including housing, employment, public benefits, community and criminal justice, education, health care, and the manner in which these issues especially impact women. Through the work of its Women's Law and Policy Project and Health Care Justice unit, the Shriver Center supports the right of all women to control their health care decisions including the decision whether and when to bear children. The Shriver Center seeks to preserve the right of all women to safe, legal abortion.

Secular Woman is a non-profit legal advocacy organization that has been working since 2012 to advance and protect secular women. One of our values is that we oppose all attempts to criminalize or limit access to comprehensive reproductive services such as contraception and abortion. We have signed numerous *amicus* briefs in cases that affect this right.

The **Service Employees International Union** ("SEIU") is the largest health care union in the United States. More than half of SEIU's two million members work in the health care industry, including as doctors, nurses, nursing assistants, therapists, administrative staff, and janitorial workers. SEIU

has perhaps the most diverse membership of any union in the United States. Half of SEIU's members are women, more than the workforce in general, and more than forty percent of SEIU members are people of color, compared to twenty-five percent of the workforce in general. In 1992, SEIU members resolved to support "the right of every woman to make reproductive choices free from government interference and call[ed] for access to a full range of health-care and family planning services" so that all women may achieve economic security and can fully participate in the workforce.

The **Southwest Women's Law Center** ("Law Center") is a non-profit policy and advocacy law center located in Albuquerque, New Mexico. The organization was founded in 2005 to advance women's equality and protect women's access to abortion services and information. Accordingly, the Law Center is uniquely qualified to comment on and inform the Court about the impact of policies, laws, and regulations that unnecessarily limit a woman's access to abortion services.

UltraViolet is a powerful and rapidly growing community of people from all walks of life mobilized to fight sexism and expand women's rights, from politics and government to media and pop culture. UltraViolet works on a range of issues including health care, economic security, violence, reproductive rights, racial justice, and immigration by putting the voices of all women, especially women of color and LGBTQ women, front and center.

USAction represents state based affiliate organizations representing hundreds of thousands of individuals across twenty states. We work for an America that works for all of us. Our members and activists care deeply about the right for women to make health care decisions with their physicians, not politicians. We believe that there should not be laws that threaten the ability for women to make personal decisions about their lives, decrease equality, and effect economic security.

Women of Reform Judaism, which represents more than 65,000 women in nearly 500 women's groups in North America and around the world, comes to this issue out of its commitment to women's access to the full range of reproductive rights.

Founded in 1917, the **Women's Bar Association of the District of Columbia** ("WBA") is one of the oldest and largest voluntary bar associations in metropolitan Washington, DC. Today, as in 1917, we continue to pursue our mission of maintaining the honor and integrity of the profession; promoting the administration of justice; advancing and protecting friendship among our members. We believe that the administration of justice includes women's access to healthcare services.

The **Women's Media Center** works to make women and girls visible and powerful in media. Our goal is to level the playing field for women and girls in media. Media is one of the most powerful forces in our culture and in our economy—it shapes our perceptions, policies, and politics. Women make up over fifty percent of the population, but female voices are

systematically excluded from media on all platforms—newspapers, online-only news sites, television, radio, social media, video games, film, sports news, and corporate/technology leadership. The problem is complicated and includes the underrepresentation and misrepresentation of women (including and at an increased level of misrepresentation and underrepresentation for women of color) in the media at all levels as content providers and as thought leaders. To challenge sexism, shape public and government discourse and policies affecting women, and provide gender-specific analysis and solutions, women need to be involved in all media sectors and we need to hold media accountable for equal voice and equal participation.

The **Women's Law Center of Maryland, Inc.** is a non-profit, membership organization established in 1971 with a mission of improving and protecting the legal rights of women, particularly regarding gender discrimination, employment law, family law, and reproductive rights. Through its direct services and advocacy, the Women's Law Center seeks to protect women's legal rights and ensure equal access to resources and remedies under the law.